APPENDIX

APPENDIX

Relevant Statutes

Interstate Commerce Act, Section 203(b)(7a), 49 U.S.C. § 303(b)(7a):

> Section 203(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; . . .

Federal Aviation Act of 1958, Section 403(a), 49 U.S.C. § 1373(a):

> Section 403(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of

currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Administrative Procedure Act

5 U.S.C. § 551(8), (9):

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 U.S.C. § 556(d):

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

Relevant Regulations

Interstate Commerce Commission:

49 C.F.R. § 210.40 Motor transportation of property incidental to transportation by aircraft.

(a) *Property moving in collection, delivery, or transfer service.* Transportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or

air freight forwarder (indirect air carrier) providing the line-haul transportation, which terminal area, if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier.

• • • •

(c) *Individual determination of exempt zones.* Upon its own motion or upon petition filed by any interested person, the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provisions of paragraph (a) of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or airfreight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

• • • •

49 C.F.R. § 404.1 Use by air freight forwarders of regulated motor common carrier service.

An air freight forwarder (indirect air carrier) subject to economic regulation under the Federal Aviation Act may receive from or turn over to motor common carriers subject to economic regulation under part II of the Interstate Commerce Act shipments the transportation of which is not within the scope of the incidental-to-aircraft exemption of section 203(b)(7a) of the Interstate Commerce Act without being considered as conducting operations as a freight forwarder subject to part IV of the Interstate Commerce Act provided:

(a) That the air freight forwarder shall not hold out to assume responsibility for, nor make any claim in its advertising, solicitation of freight, or tariff publications that it will assume responsiblity for, any shipment prior to its receipt from or after it is turned over to an authorized motor common carrier for movement beyond the air freight forwarder's terminal area as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

(b) That all shipping documents issued by the air freight forwarder shall state clearly that its responsibility for the shipment does not extend beyond its actual air movement and the territorial extent of its terminal area as provided for in tariffs published with the Civil Aeronautics Board.

(c) That the air freight forwarder shall receive no compensation from any shipper or motor carrier for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier for movement beyond the air freight forwarder's terminal area.

Civil Aeronautics Board

14 C.F.R. § 222

Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File

By Notice of Proposed Rule Making, 26 F.R. 8037, and Economic Draft Release No. 33, Docket 12951, the Board announced it had under consideration a new Part 222 of the Economic Regulations relating to the determination of zones for air cargo pickup and delivery services which may be provided pursuant to appropriate tariff filings. Therein the Board described the current practice under which an air carrier decides at which locations it wishes to provide pickup and delivery service (if at all) in and around a particular point certificated to receive air service, and files a pickup and delivery tariff with the Board setting them out. In deciding whether to accept or reject the tariff, the Board has used distance criteria. Generally speaking, tariff proposals for pickup and delivery service at distances extending beyond 25 miles either from the airport through which the carrier serves the particular point, or from the corporate limits of the city, have not been regarded as acceptable. In a number of instances, tariffs providing for services substantially beyond a 25-mile limit have been permitted to become effective, particularly at the more important certificated points.

The notice stated that the procedure of regulating terminal area services through tariff rejections under the 25-mile rule of thumb has been challenged both on a procedural basis as well as with respect to substantive validity. In that connection, the Board noted the differing views of the various classes of air carriers which had been previously solicited as to the need for changes in the Board's air cargo pickup and delivery tariff procedures and policy.

The Board sought comments on a proposed rule which contemplated the acceptance of pickup and delivery tariffs for services (a) within an area of 50 miles of the municipal center of any point receiving air service, and (b) within any "authorized pickup and delivery zone" as might be

specifically established by the Board for the major air cargo generating points. It also contemplated an application procedure under which pickup and delivery service could be considered to locations which had not been previously authorized pursuant to (a) and (b) above.

The Board's notice adverted to the jurisdictions of the Civil Aeronautics Board and the Interstate Commerce Commission in relation to air cargo pickup and delivery services. The Board's jurisdiction is confined to the acceptance or rejection of pickup and delivery tariffs filed under section 403(a) of the Federal Aviation Act as service "in connection with . . . air transportation" while the Interstate Commerce Commission must decide whether such surface transportation is a service which is "incidental to transportation by aircraft" under the Interstate Commerce Act and thus exempted pursuant to section 203(b)(7a) of Part II of that statute, or alternatively, whether a certificate of public convenience and necessity must be issued by that Commission authorizing such service. The notice stated that obviously the Board and the Commission should strive to administer the respective Acts so that there is no undue conflict between what the Board considers "service in connection with . . . air transportation" and what the Commission considers service "incidental to transportation by aircraft." In this connection, the Interstate Commerce Commission instituted a rulemaking proceeding in October 1961[1] to determine and prescribe by regulation the circumstances under which, and the areas or distances within which, the motor carriage of property in interstate or foreign commerce is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act.

In his Transportation Message to Congress of April 5, 1962, the President stated that he was "requesting the

---

[1] Motor Transportation of Property Incidental to Transportation by Aircraft (No. MC-C-3437).

Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Maritime Commission, to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislative or administrative action that will improve the regulatory process." Pursuant to the request, inter-agency committees have been established on Terminal Area matters and Freight Forwarder matters, and meetings for the consideration of their problems have been held on the Commission and staff levels.

In the Board's rulemaking proceeding, extensive comments were received as a result of the original notice and a supplemental notice, dated February 5, 1963, which sought specific information as to the adequacy of ICC licensed trucker services for air cargo pickup and delivery beyond the 25-mile zone.

On the basis of the extensive information which has been made available to the Board, we have reached these conclusions: full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation.

There are numerous certificated points which have only limited pickup and delivery services or where such service extends to the corporate limits of the community or only slightly beyond. This situation apparently reflects the current limited use of air cargo at these points. For these

communities, it is clear that the Board's present procedure of accepting tariffs under the 25-mile rule of thumb is adequate and raises no significant regulatory question for either the CAB or the ICC.

We therefore need be concerned with only the relatively few major air cargo generating points—where today effective tariffs on file with the Board provide for extensive pickup and delivery services which, in several cases, go well beyond the 25-mile rule-of-thumb area. In those instances where true pickup and delivery services are provided in relatively small vans or straight trucks and geared to air carrier schedules, such services appear to constitute "service in connection with air transportation," and we have no reason to believe that such tariffs are not properly filed. Furthermore, to the extent that additional direct air carriers or air freight forwarders desire to file pickup and delivery tariffs of their own proposing similar service in these areas, they will also be accepted.

There remains the question of considering any requests by direct air carriers or air freight forwarders for extension of pickup and delivery services beyond the areas covered by existing tariffs or the established 25-mile rule-of-thumb area. The Board believes that this should be considered only on the basis of an application procedure (similar to that set forth in our notice of proposed rulemaking) which would provide for notice to and comments by interested persons. The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul.

Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

In consideration of the foregoing, the Civil Aeronautics Board hereby adopts, effective June 12, 1964, new Part 222 of its regulations (14 CFR Part 222), to read as follows:

Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File

Sec.

222.1 Applicability.

222.2 Filing of tariffs.

222.3 Service to locations not previously authorized.

§ 222.1 *Applicability.* This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of tariffs.* In accordance with the provisions of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point, or (b) provide for service to places or areas included in

other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3 hereof. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to locations not previously authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery service to any location(s) not authorized by section 222.2 of this part, such carrier shall file with the Board a written application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all cases shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission,

Washington, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b), answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon. It shall also be served upon the applicant and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of authority.* Authority to include any location(s) in a pick-up and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,953

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

and

UNITED MOTOR FREIGHT, INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

EMERY AIR FREIGHT CORPORATION, INTERVENOR

Petition for Review of Order of the
Civil Aeronautics Board

Decided December 6, 1966

Mr. Bryce Rea, Jr., with whom *Messrs. Thomas M. Knebel* and *F. G. Freund* were on the brief, for petitioners.

Mr. Warren L. Sharfman, Associate General Counsel, Civil Aeronautics Board, with whom *Assistant Attorney General Turner, Messrs. Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. George C. Neal for intervenor. *Mr. Brian C. Elmer* also entered an appearance for intervenor.

Before FAHY, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

Judgment

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Civil Aeronautics Board on review herein is affirmed. See *Law Motor Freight* v. *CAB, Inc.*, No. 6731, 1st Cir., July 20, 1966.

Per Curiam

FAHY, *Circuit Judge, dissenting:* The above order of the court has the effect of approving an order of the Civil Aeronautics Board granting the application of Emery Air Freight Corporation, intervenor, to file a tariff for service in connection with air transportation under the provisions of Section 403(a) of the Federal Aviation Act of 1958,[1] and regulations issued by the Board under the authority of the Act.[2] The grant of the application, which was opposed by petitioners National Motor Freight Traffic Association, Inc., and United Motor Freight, Inc., permits the intervenor to engage in motor transportation of property between Flint and the airports of Detroit by a pickup and delivery service rather than by a line haul service such as is employed by petitioner United between Flint and the Detroit airports.

I agree with the Board that the application of Emery should not be denied on the written data presented to the Board, but I think the alternative relief sought by our petitioners, namely, a hearing before the Board, should have been granted. Although the distance between Flint and Detroit is 45 miles, the distance between Flint and the Detroit airports to be served is 65 or 80 miles, depending on routing. The grant of Emery's application thus permits

---

[1] 72 Stat. 758, 49 U.S.C. § 1373.

[2] 14 C.F.R. § 222.2.

a service which greatly exceeds in mileage the rule-of-thumb terminal area established by the Board for pickup and delivery service, namely, 25 miles.

The regulations applicable to the situation include Board regulation 222.3(d), which reads:

> *Order of Approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.[3]

Thus a finding is required that the proposed tariff involves service in connection with air transportation. In the context of this case this means a pickup and delivery service as distinct from a line haul service.

The reason I think a hearing is required is that the finding to be made requires resolution of the controversy over the nature of the service, and that controversy could not be resolved upon the basis of the only data before the Board. By motion United challenged the claim of Emery that the tariff was for a good faith pickup and delivery service and not a service which in fact could be furnished only by a line haul operation. The motion was supported by an affidavit of United's Treasurer, which states in part:

> Since the operating authority of United Motor Freight is limited to the handling of air freight its success depends on its ability to do what is has done, namely, gear its operations to the specific needs of shippers and receivers of air freight. This specialized service is nevertheless line haul service. The cities of Lansing, Jackson, Owosso and Flint could not be adequately, economically or efficiently served in pickup and delivery operations. One hallmark of pickup and delivery of less-than-truckload shipments is their movement from point of receipt by the carrier to point of delivery by that carrier without consolidation with

[3] 14 C.F.R. § 222.3(d).

> other shipments, i.e. without "terminalling." The distance from Flint to the Detroit airports is too great to permit this to be done economically or efficiently as a matter of routine. Hence, apart from the fact that Flint is in no sense within the bounds of the commercial zone or terminal area of Detroit, air freight shipments to and from Flint are and must be handled as line haul movements.

United also brought to the Board's attention that the Interstate Commerce Commission, acting under comparable statutory provisions,[4] had held that service between Detroit airports and Flint was not "incidental to transportation by aircraft" and therefore was not exempt from the Commission's certification requirements.

The Board relied upon *Eastern Airlines* v. *CAB*, 87 U.S. App. D.C. 331, 185 F.2d 426, for the proposition that United may not complain of damage from competition made possible by an unauthorized administrative action. I do not think the proposition applies here,[5] for though the Constitution does not guarantee protection against such damage, the agency nevertheless must follow a procedure consistent with its valid regulations reasonably construed. And having disclosed a "substantial interest" in the Board's order, United is entitled to judicial review of that order.[6]

---

[4] Civil Aeronautics Act of 1938, § 1107(j), 52 Stat. 1029, 49 U.S.C. § 303(b)(7a).

[5] See 1 Davis, Administrative Law, 412, which reads:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

[6] Federal Aviation Act of 1958, § 1006(a), 72 Stat. 795, 49 U.S.C. § 1486(a).

Considering that the nature of the proceedings was adjudicatory, and that the nature of the result was licensing, I would not classify the grant of the application as rulemaking by the Board. Moreover, the responsibility of the Board to further transportation by air, advanced by the Board in brief and argument as support for its order, does not justify refusing a hearing in this case, where the established 25-mile rule-of-thumb terminal area was exceeded so greatly. As the Board states in its order under review:

> The ultimate question to be resolved in each individual case under such procedure [Part 222 of Board's Economic Regulations] is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation.

Order No. E-22970

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
On the 6th day of December, 1965

Docket 15327

Application of

EMERY AIR FREIGHT CORPORATION

for authority to file a pick-up and delivery tariff.

Order Authorizing Filing of Pick-Up and Delivery Tariff

By application filed on June 16, 1964, and amended on September 16, 1964, Emery Air Freight Corporation (Emery) seeks authority to file pick-up and delivery tariffs for extended terminal area service pursuant to Part 222

of the Board's Economic Regulations.[1] Emery seeks authority to file tariffs governing service from Detroit to Flint, a distance of 45 miles, and to charge a rate of $1.75 per cwt. subject to a minimum of $3.50. The rate applicant charges for pick-up and delivery service within the 25-mile zone of Detroit is $1.00 per cwt. subject to a minimum of $3.00.

Emery proposes to utilize vehicles limited to 5,000 pounds capacity to perform the proposed pick-up and delivery service and to schedule its service to connect with the all-cargo scheduled service of the direct air carriers. In support of its application, Emery contends that although Flint is an airport city, it has severely limited air cargo service because (1) almost all scheduled air service between Flint and other airport cities involves connecting flights or stopovers at Detroit's Willow Run Airport, (2) all scheduled service between Flint and Willow Run Airport is performed with passenger aircraft that have limited cargo capacity,[2] and (3) many all-cargo flights between Detroit and other cities use Detroit's Metropolitan Airport which often requires surface transshipment of Flint cargo traffic between airports. Emery further contends that delays caused by shuttling cargo between airports and the limitations of the schedules and capacity of the passenger service provided at Flint have discouraged the development of

---

[1] In adopting Part 222, the Board concluded that the full development of air-cargo transportation depends in large measure upon effective customer-oriented pick-up and delivery service under the control of either the direct air carrier, or the air freight forwarder, and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pick-up and delivery services to test their adequacy and economy.

[2] Flint is served by United Air Lines and North Central Airlines. These carriers provide eight flights daily from Flint to Detroit's Willow Run Airport and seven flights daily from Willow Run Airport to Flint utilizing Convair 440, DC-6B, and Viscount aircraft.

through-bill air cargo service. For these reasons, Emery alleges that grant of tariff-filing authority for extended pick-up and delivery service to Flint from Detroit would encourage development of air freight traffic originating and terminating at Flint.

The National Motor Freight Traffic Association (NMFTA) has filed a motion requesting that the Board dismiss Emery's application, or in the alternative, that it consider the application in an oral hearing. NMFTA contends that the application should be dismissed because (1) the proposed points exceed, in distance, terminal zones recognized as exempt for purposes of motor carrier regulation by the Interstate Commerce Commission (ICC), (2) the economic data filed by the applicant are "not in conformity" with Part 222 and (3) the economic data filed by the applicant are "insufficient" to support a finding that the proposed services are "truly air cargo pick-up and delivery". NMFTA further contends that in the event the application is not dismissed by the Board, the application should be assigned for hearing because (1) the findings require the resolution of issues of fact and (2) all parties should have the right to present their case by oral or documentary evidence, and to submit rebuttal evidence in accordance with the provisions of the Administrative Procedure Act. Furthermore, NMFTA contends that the distance that must be traveled by the applicant in order to perform the proposed services is "unreasonable" and not in the nature of pick-up and delivery because it exceeds the 25-mile rule-of-thumb terminal area zone.[3]

The Board has carefully reviewed the Emery application and the objections thereto, and upon consideration of all relevant facts, we conclude that Emery should be permitted to file tariffs for pick-up and delivery service between Flint and Detroit.

---

[3] As defined by section 222.2 the 25-mile rule-of-thumb area includes "places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point".

Part 222 is designed to provide a fair and workable procedure for considering, on a case-by-case basis, requests by direct air carriers or air freight forwarders for extension of pick-up and delivery services to points beyond the area covered by existing tariffs, or the established 25-mile rule-of-thumb terminal area. The ultimate question to be resolved in each individual case under such procedure is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation. In addition to considering the distance involved we shall also give weight to whether the proposed service involves the use of specialized equipment, is geared to meeting airline schedules and is oriented to customer air transportation needs.[4]

The fact that we have authorized air carrier service between two points does not prevent a finding that surface transportation of air cargo between the proposed points is a service in connection with air transportation. In this case, the ground transportation proposed is to and from a relatively large air traffic generating point (Detroit) to a secondary point (Flint) as far as air cargo service is concerned. At Detroit the direct air carriers provide, in addition to all-cargo services, multiple schedules in all directions to other major air traffic generating points. On the other hand, Flint does not now have, nor can it expect to receive, the type and volume of service available at Detroit's Metropolitan Airport. Therefore Flint does not offer the type of service which will make available to the community the full advantages inherent in the type of all-cargo service available in Detroit. Only by permitting an integrated air-surface movement under single carrier responsibility will these advantages be afforded the present and potential users of air cargo service at Flint.

The distance between the points here involved is not so far as to preclude the services being offered as part of the

[4] See Preamble to Part 222 of the Economic Regulations.

basic air transportation service at Flint. In this respect the proposed service is no more extensive than services which we have authorized in the extended terminal areas encompassing New York, Chicago and Los Angeles where there is more than one airport terminal in a single terminal area. Furthermore, the applicant proposes to (1) coordinate pick-up an delivery services with the schedules of the direct air carriers serving the airports involved, (2) utilize equipment of the type traditionally used for pick-up and delivery operations, and (3) charge rates which are closely related to charges for pick-up and delivery service at points within the 25-mile rule-of-thumb. Based upon these considerations, we conclude that the service for which authority to file tariffs is granted, constitutes pick-up and delivery service and is "in connection with air transportation" within the meaning of section 403(a) of the Federal Aviation Act of 1958, as amended (the Act).

We turn now to a specific consideration of the objections to grant of the application. Contrary to the contentions of NMFTA, applicant has complied with the requirements of Part 222 by filing data sufficient to show that the proposed service is designed to provide extended air freight pick-up and delivery to the point designated. Moreover, with respect to NMFTA's contention that the point here involved exceeds in distance the terminal zone recognized as exempt for purposes of motor carrier regulation by the ICC, no purpose would be served by speculating whether the ICC ultimately would make such a determination if a proper application were presented to it.[5] The only question here involved is whether the services proposed are in connection with air transportation under section 403(a) of the Act, and in our judgment they are.

---

[5] Our action, of course, is not intended to reflect any views on whether applicant or its motor carrier agent requires additional authority from the ICC or other regulatory agencies.

We turn finally to NMFTA's contention that an oral argument is required or that an evidentiary hearing should be held. The Act does not require that hearings be held in connection with the grant of permission to file pick-up and delivery tariffs. Moreover, we have considered whether to grant NMFTA's request in our discretion and find that no useful purpose would be served by holding an evidentiary hearing. The objecting party has taken full advantage of the opportunity to submit pleadings and briefs and we find no issues of material fact which would require resolution at an evidentiary hearing.[6]

ACCORDINGLY, IT IS ORDERED:

1. That Emery is hereby authorized to file tariffs providing for pick-up and delivery services to Flint from Detroit;

2. That the motion to dismiss and request for oral hearing filed by NMFTA be, and they hereby are denied; and

3. That the authority granted herein shall be subject to amendment or revocation without evidentiary hearing.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

---

[6] None of the factual information filed by applicant has been controverted by NMFTA.